

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-7507

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U.S. COURT OF APPEALS
SECOND CIRCUIT

In The
United States Court of Appeals
For The Second Circuit

ROBERT CUTMORE,

Plaintiff-Appellant,

vs.

PLAZA INVESTORS HOLMDEL CORPORATION AND
HAROLD LEWIS

Defendants-Appellees.

Appeal from District Court

BRIEF FOR APPELLEES

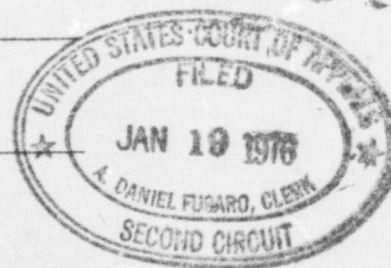
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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROBERT CUTMORE,)	Docket No. 75-7507
)	
Plaintiff-Appellant)	
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vs.)	
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PLAZA INVESTORS HOLMDEL CORPORATION)	
AND HAROLD LEWIS)	
)	
Defendant-Appellees)	January 13, 1976

APPEAL FROM DISTRICT COURT

BRIEF OF APPELLEES

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STATUTE CITED

Section 31-291	
General Statutes State of Connecticut	3, 4, 5, 8 and 9

NATURE OF PROCEEDINGS

This appeal stems from an action brought by the appellant, Robert Cutmore, against the defendant appellants Plaza Investors Holmdel Corporation and Harold Lewis.

The facts as found by the District Court in its memorandum and order, Appendix (App., 9, 10, 11,) are undisputed. On March 15, 1972, Harold Lewis was the owner of certain real estate located in Ridgefield, Connecticut, on which property a shopping center was being erected by Plaza Investors Corp. (Investors). Plaza Investors Holmdel Corp. (Holmdel), had entered into a lease with the W. T. Grant Company for a building which was under construction on the property.

The appellant, Cutmore, was an employee of Engineered Systems Corp. (Engineered) a sub-contractor of Investors. Harold Lewis was the President of both Investors and Holmdel and the sole stock holder in each corporation.

The appellant was injured when a scaffolding on which he was working tipped, causing a plank to slip and the plaintiff to fall. He attempted to save himself by jumping from the scaffolding and, in so doing, fractured his right heel when he struck the floor. The appellant received Workman's Compensation Benefits as a result of his injury.

It is unquestioned that on the day of the accident, March 15, 1972 Lewis was the sole owner of the premises, appellant was an

employee of Engineered, and Engineered was performing work on the premises by reason of a contract with Investors, the general contractor on the construction job.

The court held that Harold Lewis as sole land owner, President and sole stockholder of both companies was the only person in control (app. Page 15). The Court further held that Lewis and Investors were under a legal obligation to provide plaintiff with a safe place in which to work. As events proved, they did not (app. Page 15). The court held that as sole land owner, president and stockholder of both corporations, Harold Lewis was the only person in control and that he was the only principal employer under Section 31-291 of the General Statutes of the State of Connecticut. The Court further held that even if Lewis and Investors did not provide a safe place for the plaintiff in which to work, the defendant Lewis is protected by Section 31-291 of the General Statutes because of Lewis' potential liability under the Workmen's Compensation Act as a result of this enterprise. Therefore, recovery was denied to the appellant-plaintiff. He has appealed from the court's decision.

QUESTION PRESENTED

DID THE COURT ERR IN RULING THAT THE APPELLEE DEFENDANT LEWIS WAS IN FACT THE PRINCIPAL EMPLOYER OF THE APPELLANT PLAINTIFF CUTMORE AND THEREFORE PROTECTED FROM TORT LIABILITY BY SECTION 31-291 OF THE GENERAL STATUTES OF THE STATE OF CONNECTICUT?

ARGUMENT

Section 31-291 provides:

When any principal employer procures any work to be done wholly or in part for him by a contractor, or through him by a subcontractor, and the work so procured to be done is a part or process in the trade or business of such principal employer, and is performed in, on or about premises under his control, such principal employer shall be liable to pay all compensation under this chapter to the same extent as if work were done without the intervention of such contractor or subcontractor.

In order to come within the provisions of the statute there are three requirements:

- (1) the relation of principal employer and contractor must exist in work wholly or in part for the former;
- (2) the work must be on or about premises controlled by the principal employer;
- (3) the work must be a part or process in the trade or business of the principal employer.

King vs. Palmer, 129 Conn. 636, 30 A.2d 549, 551.

In concluding that Lewis was the "principal employer" the district court satisfied requirements (1) and (2) of the requirements needed to invoke the statute.

The district court further concluded that Lewis was in fact building a shopping center, and that was in fact part or process of his trade or business (app. Page 16).

The appellant argues that the court was incorrect in its application of Section 31-291 of the General Statutes of Connecticut to this factual situation and rendering judgment for the defendants on the basis of the statutory protection afforded by the above section of the General Statutes.

The appellant further argues that even though Lewis acquired control of the premises and knowledge of any defects therein through his corporate capacity, he is still liable as an individual because of his ownership in the property. In other words, the appellant is seeking to hold the appellee Lewis liable as an individual for defects and resultant injuries on the basis of his corporate position and knowledge gained through that position.

In support of this position the plaintiff relies on the case of Trainor vs. Frank Mercede and Sons, Inc., 152 Conn. 364, 207 Atlantic 2d 54.

In that case, the plaintiff, an employee of a third party was injured by a fall through a hole in the floor of a building under construction by the defendant contractor who had been engaged by the owners, who are also named as defendants. At the conclusion of the testimony, the court directed a verdict in favor of the owners and the jury rendered a verdict for the plaintiff against the general contractor. The trial court set aside the verdict against the general contractor and the directed verdict on the grounds that the directed verdict should not have been granted since the question of control, the basic element in the case, was one for the jury to determine. In the instant case, the trial court has indeed followed the ruling of the Trainor case, contrary to the opinion advanced by plaintiff's counsel, and come to the conclusion that the defendant Harold Lewis was in fact in control of the premises. In coming to this conclusion, the trial court decided as a matter of fact that the defendant Lewis was in control of the premises not because of his position as owner of the land alone but because of the fact that Harold Lewis was "sole land owner, President and sole stockholder of both companies and therefore the only person in control and the only principal employer" (app. Page 15).

In reaching the conclusion that Lewis was the general contractor, the trial court "pierced the corporate veils" of Investor and Holmdel and came to the conclusion that Lewis Investor and Holmdel are in effect one and the same person and that these corporations are the mere instrumentalities of the individual Lewis. The court further concluded that Lewis was the only person in control of the premises on which the plaintiff was injured and that he was in fact the only "principal employer" (app. Page 15). The question of whether or not a Court has the right to pierce a corporate veil has been the subject of considerable litigation in the United States.

"Courts will disregard the fiction of separate legal entity when a corporation is a mere instrumentality or agent of another corporation or individual owning all or most of its stock". "There must be such domination of finances, policies and practices that the controlled corporation has, so to speak, no separate mind, will or existence of its own and is but a business conduit for its principal." Zaist vs. Olson, 154 Conn. 563, 573, 227 A. 2d 552, 557. Swiss Cleaners, Inc. vs. Danaher, 129 Conn. 338, 345, 27A 2nd 806.

The circumstance that control is exercised merely through dominating stock ownership, of course, is not enough basis to disregard the fiction of a separate legal and corporate entity. Hoffman Wallpaper Company vs. Hartford, 114 Conn. 531, 535, 159 A. 346.

A corporate entity may be disregarded when the interest of justice require the courts to impose liability upon the individual who is the real actor, whenever it appears that the individual and the corporation are one and the same for all practical purposes or that the corporation is the mere instrumentality of the individual. Segan Construction Corporation vs. Nor-west Builders, Inc., 274 F Supp. 691, 698, (1967).

The appellant argues that the trial court's right to pierce the corporate veil is limited to situations where the general contractor is attempting to deprive employees of a sub-contractor of their rights under the Connecticut Workmen's Compensation Act. Certainly if Engineered had failed to provide its employee the appellant Cutmore with Workmen's Compensation coverage for his injuries, the trial court would and should have pierced the corporate veils and required Lewis to provide Workmen's Compensation coverage for the appellant under the provisions of Section 31-291 of the General Statutes of the State of Connecticut. The trial court in reaching its decision has simply applied this statute fairly and justly to protect the general contractor in a situation which the statute was intended to cover.

- "(1) The modern theory of the law of torts makes the fault of the owner a prerequisite to a recovery of damages by an injured workman. Workmen's Compensation Acts, such as ours, are founded upon the theory of a contract existing between workman and employer, an implied consideration of which is provision for compensation for injury to the workman arising in the course of his employment and not through his intentional or willful misconduct. Fault is the foundation of the tort action; compensation for the injury, regardless of the fault, of the compensation acts.
- (2) The principle of the act is new in our law. The statute is remedial in character, and its provisions are to be broadly construed in order to effectuate its purpose."

Powers v. Hotel Bond Co.,
89 Conn. 143, 146 93 A. 245, 247

The purpose of the Workmen's Compensation law has always been to provide compensation for an injury arising out of and in the course of the employment regardless of fault and the statutes are to be broadly construed to effectuate that purpose. Klapproth v. Turner, 156 Conn. 276, 279 240 A.2d 886, 888.

Section 31-291 of the General Statutes was enacted for the specific purpose of protecting employees of minor contractors against

the possible irresponsibility of their immediate employers by making the principal employer who has general control of the business in hand liable as if he had directly employed all the work upon any part of the business which he has undertaken to carry on. Bellow vs. Knotkins, 101 Conn. 304, 38, 124 A.831, 832, Kasowitz v. Mutual Construction Company, 154 Conn. 607, 228 A.2d 149.

In determining that the appellee Lewis was in fact the general contractor and therefore protected by the above cited statute, the district court implemented legislative intent of the Connecticut Workmen's Compensation Act as enacted by the General Assembly and properly served the public interest by protecting employees as a group in a manner intended by the act.

SUMMARY

It is respectfully submitted that the district court was correct in finding that Harold Lewis was the general contractor and principal employer at this construction site by reason of his ownership and domination of the corporations involved and that as a result thereof he, Lewis, was potentially liable for workmen's compensation coverage to Cutmore an employee of a

subcontractor and as a result thereof, there was no factual basis for an independant claim in tort by Cutmore against the defendant appellee Lewis or the defendant appellee Holmdel.

RESPECTFULLY SUBMITTED,

By: David J. Sullivan, Jr.
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Attorney for

The Appellees Harold Lewis and
Plaza Investors Holmdel Corporation

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROBERT CUTMORE,

Plaintiff-Appellant

VS

PLAZA INVESTORS HOLMDEL CORPORATION
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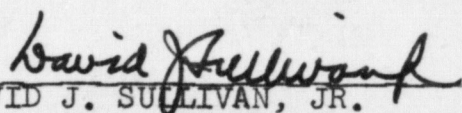
Docket No. 75-7507

January 16, 1976

CERTIFICATION OF SERVICE

The undersigned certifies that two copies of the Appellees' brief in the above captioned case have been sent by United States Mail, pre-paid postage to VICTOR FERRANTE, ESQ., Attorney for Appellant, 285 Golden Hill Street, Bridgeport, Connecticut 06604 on January 15, 1976, pursuant to Rule 31B of the Federal Rules of Appellant Procedures.

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